LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
OCT 29 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 477

IN THE MATTER OF THE APPLICATION OF
JOSEPH LEWIS AND ALFRED L. KLEIN,
Petitioners,

FOR AN ORDER AGAINST

JAMES E. ALLEN, JR., COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent.

BRIEF OF THE ATTORNEY GENERAL OF MARYLAND, AMICUS CURIAE

In which the several States shown herein have joined through their respective Attorneys General.

THOMAS B. FINAN,
Attorney General of Maryland,

DAVID T. MASON,
Assistant Attorney General of Maryland,
Suite 1200, One Charles Center,
Baltimore, Maryland 21201.

The Daily Record Co., Baltimore 3, Md.

JOINING IN THE BRIEF

Honorable Richmond M. Flowers, Attorney General of Alabama.
Honorable Robert W. Pickrell, Attorney General of Arizona.
Honorable Bruce Bennett, Attorney General of Arkansas.
Honorable Duke W. Dunbar, Attorney General of Colorado.
Honorable David P. Buckson, Attorney General of Delaware.
Honorable James W. Kynes, Jr., Attorney General of Florida.
Honorable Eugene Cook, Attorney General of Georgia.
Honorable Bert T. Kobayashi, Attorney General of Hawaii.
Honorable Allan G. Shepard, Attorney General of Idaho.
Honorable William M. Ferguson, Attorney General of Kansas.
Honorable Robert Matthews, Attorney General of Kentucky.
Honorable Jack P. F. Gremillion, Attorney General of Louisiana.
Honorable Frank E. Hancock, Attorney General of Maine.
Honorable Joe T. Patterson, Attorney General of Mississippi.
Honorable Forrest H. Anderson, Attorney General of Montana.
Honorable William Maynard, Attorney General of New Hampshire.
Honorable T. Wade Bruton, Attorney General of North Carolina.
Honorable Helgi Johanneson, Attorney General of North Dakota.
Honorable Walter E. Alessandroni, Attorney General of Pennsylvania.
Honorable J. Joseph Nugent, Attorney General of Rhode Island.
Honorable Daniel R. McLeod, Attorney General of South Carolina.
Honorable Frank L. Farrar, Attorney General of South Dakota.
Honorable George F. McCanless, Attorney General of Tennessee.
Honorable Waggoner Carr, Attorney General of Texas.
Honorable A. Pratt Kesler, Attorney General of Utah.
Honorable Charles E. Gibson, Jr., Attorney General of Vermont.
Honorable Robert Y. Button, Attorney General of Virginia.
Honorable C. Donald Robertson, Attorney General of West Virginia
Honorable John F. Raper, Attorney General of Wyoming

INDEX

Table of Contents

	PAGE
Interest of the State of Maryland	1
Jurisdiction	3
Question Presented	3
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons Why Writ of Certiorari Should Not Be Granted	4
Conclusion	9

Table of Citations

Cases

Engel v. Vitale, 370 U.S. 421	4, 5, 6, 8
School District of Abington Township v. Schempp, 374 U.S. 203	5, 6, 7, 8
Zorach v. Clauson, 343 U.S. 306, 313	8

Statutes

Annotated Code of Maryland (1957 Edition and 1964 Supp.):	
Article 77—	
Section 98	2
Section 98A	2
Section 247	2, 6
Constitution of the United States:	
First Amendment	3, 4, 5, 6, 7, 8
Education Law of the State of New York:	
Section 802, subsection 1	4

PAGE

United States Code Annotated:
Title 28—
Section 1254(3) 3
Supreme Court Rules, Rule 27, 1(d) 3
Title 36—
Section 172 ..... 3, 5

Miscellaneous

House of Representatives Report No. 1693, 83rd Congress, 2nd Session, Page 3 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 477

IN THE MATTER OF THE APPLICATION OF
JOSEPH LEWIS AND ALFRED L. KLEIN,
Petitioners,

FOR AN ORDER AGAINST

JAMES E. ALLEN, JR., COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent.

BRIEF OF THE ATTORNEY GENERAL OF MARYLAND, AMICUS CURIAE

In which the several States shown herein have joined through their respective Attorneys General.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Brief is submitted on behalf of the State of Maryland in opposition to the granting of the Writ of Certiorari sought herein.

INTEREST OF THE STATE OF MARYLAND

There are twenty-three counties in the State of Maryland in addition to the separate political subdivision known as Baltimore City. Each county and Baltimore City has a governing Board of Education whose duty it is to supervise

the education and instruction of the children in its respective county or city. There are three Maryland statutes with statewide applicability that are pertinent to the issues raised by the Petitioners. Of particular relevance is Article 77, Section 247 of the Annotated Code of Maryland (1957 Edition) which reads as follows:

> "It shall be the duty of the board of education of each and every county in the State of Maryland, and of the Board of Education for Baltimore City, in the State of Maryland, to cause to have displayed a flag of the United States of America upon every public school building within their respective jurisdictions while said schools are in session, and to that end shall make all necessary purchase of flags, staffs and appliances therefor and establish rules and regulations for the proper custody, care and display of the flag in said schools; and it shall be the duty of said boards of education to prepare for the use of the public schools of the State a programme providing for the salute to the flag, and such other patriotic exercises from time to time as may be deemed by them to be expedient, and under such regulations and instruction as may best meet the various requirements of the different grades in such schools; all to the end that the love of liberty and democracy, signified in the devotion of all true and patriotic Americans to their flag and to their country, shall be instilled in the hearts and minds of the youth of America."

The other relevant statutes are Article 77, Section 98 of the Code which refers to the singing of the National Anthem, and Article 77, Section 98A which relates to a period of silent meditation. In addition, the aforesaid subdivisions of the State have rules and regulations regarding appropriate patriotic exercises, including the Pledge of Allegiance to the Flag of the United States.

In view of the state and national interests in this case, and the myriad implications of the issues raised for resolu-

tion by this Court, the Attorneys General of the states listed on the inside cover of this Brief have joined in Opposition to the Petition for Certiorari.

JURISDICTION

Petitioners herein invoked the jurisdiction of the Court under Title 28 U.S.C.A., Section 1254(3). This Brief of the State of Maryland as amicus curiae is filed under the authority of Supreme Court Rules, Title 28 U.S.C.A., Rule 27, 1,(d).

QUESTION PRESENTED

Whether the Respondent's recommendation to the public schools under his jurisdiction to use the Pledge of Allegiance to the flag of the United States, containing the words "under God" violates the provisions of the First Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The following portion of the First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

2. Title 36 U.S.C.A., Section 172, Pledge of Allegiance to the flag; manner of delivery:

> "The following is designated as the pledge of allegiance to the flag: 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.' Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely stand-

ing at attention, men removing their headdress. Persons in uniform shall render the military salute."

3. Subsection 1 of Section 802 of the Education Law of the State of New York:

"1. It shall be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools."

STATEMENT OF THE CASE

The Attorney General of Maryland adopts the Respondent's Statement of the Case as presented on pages 9, 10 and 11 of his Brief.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Although there may well be, as urged by Respondent, procedural disabilities that would preclude the granting of this writ to the Petitioners, the main thrust of this Brief in opposition to the granting of the writ is addressed to the narrow constitutional issue of whether the recital of the Pledge of Allegiance to the Flag, *supra*, in public schools, contravenes the Establishment Clause of the First Amendment of the Constitution of the United States.

In *Engel v. Vitale*, 370 U.S. 421 this Court held that the daily recital of the state composed Regent's Prayer in public school classrooms was a religious exercise and constituted an establishment of religion in violation of the First Amendment to the Constitution.

In *School District of Abington Township v. Schempp*, 374 U.S. 203 this Court held that the reading of the Bible and the recitation of the Lord's Prayer in public schools were religious exercises and violated the mandate of the First Amendment to the Constitution prohibiting the establishment of a religion.

The Petitioners argue that the classroom recitation of the Pledge of Allegiance containing the phrase "under God" is also a religious exercise which violates the Establishment Clause of the First Amendment. Petitioners rely chiefly on *Engel* and *Schempp*, *supra*, as authorities in support of their argument.

Although the argument of the Petitioners may have surface plausibility, it cannot survive close examination, being predicated on the false premise that the Pledge of Allegiance is a religious exercise, as opposed to a patriotic ceremony.

Title 36, Section 172 of the United States Code, *supra*, relates to patriotic observances and customs, including personal conduct during the playing of the National Anthem, manner of delivery of the Pledge of Allegiance to the Flag, and display of, and respect for, the flag.

A reading of the legislative history and purpose of this Act, clearly shows that the Pledge of Allegiance, in its historical frame of reference, was never intended as a religious exercise but was designed essentially for patriotic purposes. See *e.g.*, the House Report* recommending the addition of the words "under God" to the Pledge of Allegiance. This report states, *inter alia*, that the words "under God" were not in conflict with the First Amend-

* House Representatives Report No. 1693, 83rd Congress 2nd Session, Page 3.

ment of the Constitution but recognized "only the guidance of God in our national affairs."

It is too clear for argument that the intent and purpose of Congress and the several states in enacting the Pledge of Allegiance, was to promote a spirit of patriotic and civic pride and to foster intellectual and moral qualities so essential in preparing the youth of this great nation to meet the responsibilities and obligations of citizenship.

The congressional and legislative intent in the enactment of the Pledge of Allegiance, is perhaps best expressed by that part of Article 77, Section 247 of the Maryland Code, *supra*, which states:

> "* * * it shall be the duty of said boards of education to prepare for the use of the public schools of the State a programme providing for the salute to the flag, and such other patriotic exercise * * * all to the end that the love of liberty and democracy, signified in the devotion of all true and patriotic Americans to their flag and to their country, shall be instilled in the hearts and minds of the youth of America."

A careful reading of *Engel* and *Schempp*, *supra*, clearly suggests that Petitioners' reliance on them is completely misplaced. There is nothing in either case to intimate or suggest that the use of the words "under God" in the Pledge of Allegiance constitutes an establishment of a religion or otherwise violates the First Amendment to the Constitution. On the contrary, these cases suggest an opposite meaning.

In *Engel*, *supra*, at page 435, Footnote 21, this Court said:

> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain

references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." 370 U.S. 421, 436, 8 L. Ed. 2d 601, 610.

In *Schempp, supra*, Mr. Justice Brennan in his extended and luminously expounded concurring opinion, specifically suggested, *inter alia*, that the use of the Pledge of Allegiance may not be that type of involvement which the First Amendment to the Constitution prohibits. He observed at pages 303, 304:

"This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." 374 U.S. 203, 303-304, 10 L. Ed. 2d 844, 903-904.

Mr. Justice Brennan again referred, *inter alia*, to the Pledge of Allegiance at pages 281-282:

"It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the

community or the proper degree of separation between the spheres of religion and government." 374 U.S. 203, 281-282, 10 L. Ed. 2d 844, 891-892.

Mr. Justice Goldberg, in his concurring opinion, also observed:

> "And, of course, today's decision does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause." 374 U.S. 203, 307, 10 L. Ed. 2d 844, 906.

It is apparent from the majority opinion in *Engel, supra*, and the concurring opinions of Mr. Justice Brennan and Mr. Justice Goldberg in *Schempp, supra*, that the use of the Pledge of Allegiance in public schools is not an impermissible involvement by the State in religion, and that said pledge is not within the constitutional orbit of the First Amendment.

If we are misreading the import and reach of these opinions, and Petitioners' attack on the use of the Pledge of Allegiance in public schools is sustained, it would, with devastating impact, give further encouragement to those whose unrelenting and dedicated effort it is to remove from our public life every vestige of our religious heritage. This thought is intolerable, and we suggest that the Court *lay to rest* further efforts to establish a *religion of secularism* in our schools, by denying this petition and reaffirming the fact that:

> "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L. Ed. 954, 962.

CONCLUSION

For the reasons stated herein and for the reasons set forth in the Respondent's Brief, it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General of Maryland,

DAVID T. MASON,
Assistant Attorney General of Maryland,
Suite 1200, One Charles Center,
Baltimore, Maryland 21201.